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Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER D. BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

(1) Was Christopher Banks entitled to a new trial when his Fifth Amendment rights were violated by the prosecutor's improper introduction of information of the defendant's refusal to talk to the FBI until he had talked to his attorney during the government's case in chief and by introduction of false and misleading statements during the government's rebuttal closing argument.

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PETITION FOR WRIT OF CERTIORARI

Christopher David Banks respectfully petitions for a writ of certiorari to review the memorandum decision of the United States Court of Appeals for the Sixth Circuit entered and filed on April 5th, 2002.

OPINION BELOW

United States v. Christopher Banks, No. 00-6335(6th Cir. Feb. 5th, 2001), Memorandum Opinion (attached as Appendix "A"), Order on Petition for rehearing en banc (attached as Appendix "B").

JURISDICTION

This Court has jurisdiction under 28U.S.C. §1254(1) and the petition is timely under Supreme Court Rule 13.4. Defendant-Appellant was granted an extension of time in which to file this petition until September 3rd, 2002 due to medical conditions (open heart surgery) and this date was extended for 60 days to allow the Defendant to make necessary changes to the format of his petition.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amendment v provides that "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..." *See* Appendix D

STATEMENT OF THE CASE

On June 9th, 1999, Christopher Banks was indicted by a federal grand jury on four counts of transporting stolen computers across state lines in violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2, aided and abetted by William Nieman. On the government's motion, the district court

later dismissed the first two counts. Counts three and four were renumbered Counts One and Two, respectively, when the case went to trial.

The basis of renumbered Counts One and Two were that petitioner knowingly transported stolen computers from Kentucky to Ohio.

STATEMENT OF FACTS

A. Background

Petitioner managed a convenient store owned by his wife who was a registered nurse and also worked at the convenient store.

Petitioner had as his acquaintance, one William Nieman, whom he had known for some eight years prior to the events which gave rise to the charges in this case. Mr. Nieman was employed as a manager at a freight distribution and warehousing operation in Erlanger, Ky. While employed at the location, Nieman stole, and later pleaded guilty to stealing, approximately 150 computers which belonged to IBM and which were in transit to several of their distributors but being temporarily stored at Nieman's place of employment.

B. The Basis of The Indictment.

For three years (1996 to 1999) Mr. Nieman told investigators that he had stolen the computers and sold them to the Petitioner without Petitioners knowledge that they were stolen. In 1999 Mr. Nieman changed his story and told investigators that the Petitioner knew the computers were stolen when he purchased them. Mr. Nieman maintained at all times and testified at trial that he had transported the computers from Count 1 across the

state lines from Kentucky to Ohio. Nieman testified that he had been paid in cash for each sale.

C. Trial Testimony.

At trial, during the government's case in chief, the prosecutor introduced information of the defendant's refusal to talk to the FBI until he had talked to his attorney. FBI agent Dale Cannon told the jury that he and detective Bill Mark went to Petitioner's home in order to speak with him. Agent Cannon then testified that Banks "advised that he didn't want to talk to us, he wanted to talk to his attorney."

The Petitioner felt compelled to testify after the prosecution had made an issue of the Petitioner's pre-trial silence during the government's case-in-chief.

Petitioner stated at trial that he had not known that the computers were stolen when he brokered the sale between the company Mr. Nieman represented (Tech Marketing) and Tom O'Brien who worked for IBM Market Source, a reseller of used IBM computer equipment. Petitioner testified that he had paid Mr. Nieman by check.

The subject of the defendant's silence was broached again while the defendant was being cross-examined after taking the stand in his own defense. The prosecutor, Ms. Voorhees, asked Mr. Banks why he had not cooperated with the government's investigation in the beginning. He replied that he had cooperated by turning over all of the documents requested in a subpoena. Ms. Voorhees then asked, "But what I am talking about, sir, is that when Dale Cannon knocked on your door with Bill Park [sic], asked if you would talk to him, and you told him no -." Defense counsel objected and the court sustained the objection. The district judge thereafter gave the jury the following instruction:

"And the jury is advised that whenever an FBI agent came to Mr. Banks' door and asked to talk to him, he didn't have to talk to him, and that declining to talk with an FBI agent is not the same thing as declining to cooperate with either the FBI or with the Assistant United States Attorney. And, Ms. Voorhees, you are admonished not to make such an implication again."

The jury began deliberations at 11:45 a.m. on April 27, 2000. Four hours after the commencement of deliberations the jury sent a note to the Court in which the jury foreperson, contrary to instruction Number 26, disclosed that two or three jurors were holding out for "not guilty" verdicts based upon reasonable doubt. The foreperson asked for help or suggestions in dealing with the situation. The Court sent back a note indicating that it could not respond and asking if further deliberation would be helpful. The foreperson replied that two jurors were voting not guilty; further deliberation would not change their vote and that neither side could convince the other to change. Defense counsel objected to the giving of an Allen charge and the Court sent the jury back for more deliberation. Defense counsel then moved for a mistrial due to the jury's direct violation of instruction 26 by giving the numerical split of the jury, which motion was overruled. The Court then sent the jury an additional note advising them not to tell the Court how they were divided and asking whether they wished to continue deliberating that night or return tomorrow. The jury responded with a note saying they were close to an answer and requested a copy of the testimony of prosecution witness Tom O'Bryan. The Court then replied that it was not its practice to permit the jury to review trial testimony. The jury foreperson sent back a note to say that without the testimony of witness O'Bryan "we seem to be deadlocked, should we come back tomorrow?" The defense again moved for a mistrial, which was denied. After calling the

jury in and giving the Allen charge the Court added a personal statement, which included the words "after following this last instruction I've given you, as I indicated I hope that you are able to reach a unanimous agreement." The jury then returned, approximately 30 minutes later at 7:30 p.m., from it's continued deliberation with a guilty verdict.

D. The Decision Below.

The Sixth Circuit panel, in affirming the conviction, unanimously determined that the information about the defendant's pre-trial silence should not have been elicited during the government's case-in-chief. The panel determined that there had been plain error at trial but held that the error did not seriously affect the fairness or integrity of the proceedings. This decision was made without benefit of the certified record. The certified record had never been sent to the Court on appeal (Appendix, "C").

The panel was not of one mind as to whether the use of the defendant's pre-trial silence for impeachment purposes was improper. The panel was unanimous in determining that by sustaining the objection to the prosecution's question and instructing the jury as it did, the trial court cured any problem that may have been inherent in the cross-examination.

In his petition for rehearing en banc, Mr. Banks asked the Sixth Circuit Court of Appeals to conduct a Remmer-like hearing to determine whether the violations of substantial rights of the defendant were the cause of his conviction. That petition was summarily denied. (Appendix "B")

LOWER COURT JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and the Sixth Circuit had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's Published Opinion Is In Conflict With The Supreme Court's Decision In *Olano* And *Hale* And With It's Own Decision In *Combs*. The Sixth Circuit should have followed these cases and found a violation of Mr. Banks' Fifth Amendment right of silence as well as a violation of this Court's supervisory authority as exercised in United States v. Hale,422 US 171, prohibiting the use of pre-trial silence for impeachment purposes. In addition these violations were intentional and represented serious misconduct on the part of the prosecutor.

In Combs v. Coyle 2000 FED App. 0064 (2000), the Sixth Circuit recognized a significant split between the Circuits over whether the use of the Defendant's pre-trial silence during the government's case-in-chief was a violation of a defendant's fifth amendment right to silence.

A decision on the issues presented in this case would provide the opportunity to maintain uniformity between the various circuits and resolve the conflicts related to the use of a defendant's pre-trial silence within the Federal Courts.

Four Circuits (the 1st, 6th,7th & 10th) have held that use of the defendant's pre-trial silence during the government's case-in-chief violates the privilege against self-incrimination found in the Fifth Amendment.

The 5th, 9th & 11th Circuits have held that use of the defendant's pre-trial silence does not violate the Fifth Amendment privilege against self incrimination.

In Jenkins v. Anderson, 447 U.S. 231 (1980), this Court determined that a state prosecutor may comment

on a defendant's silence if it occurred prior to the time that he is arrested and given his Miranda warnings.

In United States v. Hale, 422 US 171 this Court exercised It's supervisory authority over the Federal Courts to establish a rule that the evidentiary standard for Federal Courts is that prior silence of a defendant or a request for counsel cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to a defendant might result.

ARGUMENTS

I. The Sixth Circuit's Unpublished Opinion Is In Conflict With the Supreme Court's Decision In *Olano, Hale* And The Circuit's Own Decision In *Combs*. The Sixth Circuit Should Have Followed These Cases And Reversed Both Counts Finding That The Violation of the Defendant's Fifth Amendment Right To Silence Affected the Fairness And Integrity Of The Proceedings

The Sixth Circuit Court of Appeals correctly determined that plain error had occurred at the trial level in this case. The decision found that the governments' use of pre-trial silence during the government's case-in-chief violated the defendants Fifth Amendment right to silence and was error.

The panel erred when it determined that this violation did not meet the fourth prong of the plain error test of United States v. Olano, 507 U.S. 725, 732(1993). The fourth prong allows the court to exercise discretion to intervene if the error (4) "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

In the instant case the Petitioner had not yet

determined whether he would testify when the government intentionally made issue of the Petitioner's pre-trial silence.

The prosecutor had every opportunity to bridge the issue of her use of the defendant's pre-trial silence at a pre-trial conference but failed to do so.

The prosecutor's questions directed toward Agent Cannon were intended to bring out the fact that the Petitioner had declined to speak with the FBI and that Petitioner told agent Cannon that he wanted to talk to his attorney. This was an intentional act on the part of the prosecution intended to violate the defendant's Fifth Amendment right to silence.

The author of the court of appeals decision improperly stated the test for determining whether an error seriously affects the fairness, integrity, or public reputation of judicial proceedings. The author wrote; "In other words, "the error must have been prejudicial: [i]t must have affected the outcome of district court proceedings." Olano, 507 U.S. at 734." *United States v. Christopher Banks,* No. 00-6335(6th Cir. Feb. 5th,2001),Page 9a,(Appendix "A").

This language is the test given for the third prong of Olano which the panel unanimously agreed had been met.

The Olano decision does not set out a simple standard of review for the fourth prong of the test. It relies on the language set out in United States v. Atkinson, 297 U.S. 157 (1936). The Atkinson Court held that appellate courts should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings".

This Court, in Olano determined that "An error may "seriously affect the fairness, integrity or public

reputation of judicial proceedings" independent of the defendant's innocence. Conversely, a plain error affecting substantial rights does not, without more, satisfy the Atkinson standard, for otherwise the discretion afforded by Rule 52(b) would be illusory."

The Sixth Circuit, without benefit of the certified record, conducted an analysis of the Atkinson language (seriously affect[s] the fairness, integrity or public reputation of judicial proceedings) based on a test that "the error must have been prejudicial: [i]t must have affected the outcome of the district court proceedings." *United States v. Christopher Banks,* No. 00-6335(6th Cir. Feb. 5th,2001),Page 9a, (Appendix "A").

The author of the decision miss-quoted the Olano decision and as a result the analysis that he performed to satisfy the Atkinson language was faulty. The issue of prejudice while relevant is not determinative. As stated previously, an error may seriously affect the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. The Olano decision did not consider this fourth prong of the plain error test. The court specifically mentioned that "We need not consider whether the error, if prejudicial, would have warranted correction under the Atkinson standard as "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings". *Olano* P 741

The Sixth Circuit, in it's decision in Combs, reasoned that use of the defendant's pre-trial silence seriously affects the fairness of judicial proceedings. "Perhaps most importantly, use of a defendant's prearrest silence as substantive evidence of guilt substantially impairs the "sense of fair play" underlying the privilege." Combs at 46. The Court goes on to say that "the use of a defendant's prior silence as substantive evidence of guilt actually lessens the prosecution's burden of proving each

element of the crime." Combs at 46

For the Sixth Circuit to now take a position that the use of pre-trial silence does not seriously affect the fairness, integrity or public reputation of judicial proceedings seems to be totally inconsistent with their own prior holding.

The Sixth Circuit Court of Appeals reviewed the evidence of the case without the benefit of the certified record and made a faulty analysis of both the law and the facts.

The Fifth Amendment to the United States Constitution protects the defendant's right to silence. It has long been heralded by this Court as a fundamental right, which must be protected. In Griffin v. California 380 US 609 at 613 - 615 (1965) , the United States Supreme Court held that prosecutors are prohibited from commenting upon a defendant's assertion of Fifth Amendment rights [refusal to testify at trial], as impermissibly penalizing the exercise of that privilege.

This prosecutor's intentional use of the Petitioner's pre-trial silence was a direct violation of the Sixth Circuit Court of Appeals decision in Combs v. Coyle 2000 FED App. 0064 (2000).

The abridgment of this right clearly affected the fairness, integrity and public reputation of the judicial proceedings. The events, which followed the error, including the decision by the defendant to testify, were all consequential to the error. It is impossible to determine what "would have happened" had the prosecutor not infringed on the defendant's rights.

The subject of the defendant's silence was broached a second time while the defendant was being cross-examined after taking the stand in his own defense.

The prosecutor asked the Petitioner why he had not cooperated with the government's investigations in the beginning. He replied that he had cooperated by

turning over all of the documents requested in a subpoena. The prosecutor then asked, "But what I am talking about, sir, is that when Dale Cannon knocked on your door with Bill Park, asked if you would talk to him, and you told him no-." Defense counsel objected, and the court sustained the objection. The district judge thereafter gave the jury the following instruction:

"And the jury is advised that whenever an FBI agent came to Mr. Banks' door and asked to talk to him, he didn't have to talk to him, and that declining to talk with an FBI agent is not the same thing as declining to cooperate with either the FBI or with the Assistant United States Attorney. And, Ms. Voorhees, you are admonished not to make such an implication again."

The Sixth Circuit Panel was divided as to whether this impeachment use of the defendant's pre-trial silence was a violation of the defendant's rights. They also did not determine whether this action by the prosecutor was a violation of the exercise of the supervisory authority of the Supreme Court over the district courts in the decision of United States v. Hale 422 US 171, 180-181 (1975). In the Hale case this court determined that the evidentiary standard for Federal Courts would be that prior silence of a defendant or a request for counsel cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to a defendant might result.

The panel was unanimous that "by sustaining the objection to the prosecution's question and instructing the jury as it did, the trial court cured any problem that may have been inherent in the cross-examination." *United States v. Christopher Banks*, No. 00-6335(6th Cir. Feb. 5th,2001),Page 7a,(Appendix "A").

Though undisclosed by the panel, the defendant assumes that the majority of the panel was of the opinion

that the impeachment use of the defendant's pre-trial silence was error. The issue discussed here is whether the jury instruction could and did cure the error.

It is the position of this defendant that the impeachment use of the defendant's pre-trial silence was a violation of this Court's exercise of authority as outlined in Hale.

The trial court's attempt at curing the violation was insufficient. The damage was already done and the only available remedy at that time was to declare a miss-trial. The instruction given by the court merely pointed out that Mr. Banks had a right not to talk to the FBI. The instruction which indicated that not talking to the FBI is not the same as not cooperating with the FBI is a distinction without a difference. Clearly not talking to the FBI is the same as not cooperating. The court, by reminding the jury that the defendant had a right to silence simply exacerbated the problem created by the prosecutor who had brought the Petitioner's pre-trial silence before the jury again.

If we follow the logic of the panel, it would never be a violation of the defendant's rights for the prosecutor to comment on the defendant's pre-trial silence or his right not to testify so long as the court issues an instruction to the jury that the defendant has the right not to testify or talk to the FBI.

The damage is done when the prosecutor makes the statement. No instruction from the judge can erase the damage. The prosecutor was given fair warning in Hale not to broach the defendant's pre-trial silence.

Failure of the prosecutor to heed the order of the Supreme Court as exercised in it's supervisory authority over the district court should result in the heavy burden outlined in Chapman v. State of California 386 US 18,17 LED 2d 705 requiring that the court determine and that the prosecution prove that the error was harmless beyond

a reasonable doubt.

II. THE SIXTH CIRCUIT COURT OF APPEALS ERRED BY FAILING TO FIND THAT THERE HAD BEEN SERIOUS PROSECUTORIAL MISS-CONDUCT.

In addition to the prosecutorial miss-conduct outlined above, the Sixth Circuit panel determined that the prosecutor had made misleading statements concerning the evidence presented at trial. They determined that these statements were not flagrant or prejudicial.

During the rebuttal portion of her closing argument, the prosecutor said this:

"Mr. Banks through his attorney wants you to believe that we were at fault or did something wrong by not getting a handwriting exemplar from Mr. Nieman. Why should we have done that, ladies and gentlemen? In the beginning he told us that that was his handwriting, he told us that there's no basis for us to get a handwriting exemplar. We believed what he told us. It was only later when he told us that that wasn't his handwriting, it was Mr. Banks' handwriting."

The exculpatory information that Nieman had told the government that the handwriting on the checks had been his had never been disclosed during discovery. The defense brought a motion to the court to set aside the conviction based on a Brady violation in which the defendant argued that he should have been entitled to the information that Nieman had told the government that he had endorsed the checks, which were the major focal point of the entire trial, during discovery. It was in response to that motion that the prosecution admitted that the statement made in the final closing argument had been false. She admitted that;

1) Nieman never told the prosecution that that was his handwriting.
2) Nieman never told the prosecution that there was no need to get a handwriting exemplar.
3) Nieman never told the prosecution later that that wasn't his handwriting.
4) Nieman never told the prosecution that it was Mr. Banks' handwriting.

The Sixth Circuit panel aped the position of the government that these statements "detracted from Nieman's credibility, the statement may have even bolstered Mr. Banks' position." *United States v. Christopher Banks,* No. 00-6335(6th Cir. Feb. 5th,2001),Page 11a,(Appendix "A").

This is an incredible position for the panel to take. Based on a letter received from the Clerk of the Court (Appendix "C"), the panel had not reviewed the complete record of this case and appears to have accepted the prosecution's spin on these events without independent review. The prosecutor's fabrication of these facts could not have been more damaging to the defendant's case. They bolstered Nieman's prior testimony that he had a change of heart and decided to come forward with the "truth" and added new facts that were never testified to by anyone but the Assistant United States Attorney.

The panel's review of this matter was de novo. As mentioned previously, the panel made this de novo review without access to the certified record (Appendix "C"). The panel pointed out that there was no contemporaneous objection to these statements and applied the flagrancy test outlined in United States v. Francis, 170 F. 3d 546, 549 (6th Cir. 1999). They held that "Since defense counsel did not contemporaneously object to what Ms. Voorhees said in closing argument, we can only reverse on the basis of the misstatement if we find it

tainted by the requisite flagrancy.

The defendant takes exception to both the application of the law and to the de novo findings of fact that the panel used to make its determination.

Petitioner argues that he could not have made a contemporaneous objection without the requisite knowledge that the statements were false. The defense was not privy to the conversations that took place between Mr. Nieman and the prosecution.

Had the Defendant and his counsel been aware that AUSA Voorhees was presenting false and misleading testimony to the jury, he would surely have objected.

Had the objection been made and the trial court been made aware that the information was false and misleading, the trial court would no doubt have attempted to admonish the jury to disregard the information or declared a miss-trial. The information Ms. Voorhees presented was inflammatory and tended to prejudice the jury against the defendant.

Upon receipt of the government's admission that it had argued false evidence the defendant renewed his request for a new trial or judgment of acquittal.

The argument by a prosecutor of facts not of record, in the guise of the prosecutor's direct personal knowledge, and which facts are false, is serious misconduct.

This Court has stated that a defendant has the right to have his guilt decided solely on the evidence properly presented to the jury, without suggestion of other evidence known to the prosecutor. United States v. Young 470 US 1, 18, 84 L Ed 1, 105 S Ct 1038. That Court condemned direct manipulation or misstatement of evidence by prosecutors. Darden v. Wainwright 477 US 168 at 172, 91 L Ed 144, 106 S Ct 2464.

Prosecutor Voorhees' argument combined the statement of facts not presented at trial, the presentation

of false information and the implication that the prosecution possessed special knowledge. Such remarks are condemnable on any one of these three basis of impropriety because they are so misleading to a jury and prejudicial to a defendant. "Improper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 US 78 at 87 (1935).

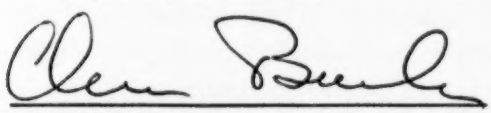
The facts of this case support a finding of serious prosecutorial misconduct.

The jury in this case was not convinced that the evidence was overwhelming. At least three jurors were holding out as "not guilty" for the majority of the deliberations. Only after pressure from the judge (who knew the numerical split of the vote of the jurors) in the form of an Allen charge and a personal plea from the judge did the jury reach a unanimous verdict.

CONSLUSION

These questions are appropriate for the Writ because they are of exceptional constitutional import: the defendant's right to silence and the right to a fair trial free of serious prosecutorial misconduct.

Respectfully submitted: November 12, 2002.



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CERTIFICATE OF MAILING - PROOF OF SERVICE

Christopher D. Banks, Pro Se, declares under penalty of perjury that the following is true and correct:

That in accordance with rule 29(2), Supreme Court Rules, he has properly deposited in a United States Post Office or mailbox the original and ten (40) copies of Petitioner's Petition for Writ of Certiorari to be forwarded to the Clerk of the Supreme Court of the United States of America within the period prescribed in Rule 13.1, Supreme Court Rules.

That in accordance with Rule 29.5, Supreme Court Rules, two copies of this Petition for Writ of Certiorari have this 12th day of November, 2002, been properly deposited in a United States Post Office to AUSA Laura Voorhees, United States Attorney's office, P.O. Box 72, Covington, KY 41012-0072.

Executed this 12th day of November 2002.

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